BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2019-262-E

In re:

Application of Duke Energy Progress, LLC for Approval of Rider DSM/EE-11, Decreasing Residential Rates and Increasing Non-Residential Rates	DUKE ENERGY PROGRESS, LLC'S RESPONSE TO COMMENTS

Duke Energy Progress, LLC ("DEP" or the "Company") provides the following reponse to the comments filed by parties to the above-referenced proceeding, including the report filed by the South Carolina Office of Regulatory Staff ("ORS") on November 8, 2019 ("ORS Report"). As discussed below, the Company respectfully requests that the Commission reject ORS's proposed adjustment related to employee compensation. The Company accepts ORS's Program Cost Audit Adjustment in the amount of $592.05, and requests that the Commission approve the Company's Rider 11 application to be effective January 1, 2020, subject to the Program Cost Audit Adjustment, which will be taken into account in an adjusting journal entry prior to the Company's next annual filing.

I. Background

On August 1, 2019, the Company filed its annual application to recover certain costs and revenue associated with its demand-side management ("DSM") and energy efficiency ("EE") programs. The proposed Rider 11 provides for the recovery of DSM/EE costs allocated jurisdictionally to South Carolina for the test period, January 1, 2018 through December 31, 2018, and for the forecast period, January 1, 2020 through December 31, 2020; net lost revenues for

DSM and EE programs as applicable; and program/portfolio performance incentives as applicable, in accordance with Order No. 2015-596. That order, which granted the Company's application for implementation of a new EE/DSM cost recovery mechanism, permitted DEP to annually recover all reasonable and prudent costs incurred for adopting and implementing DSM and EE measures.[1] Order No. 2015-596 also provided that, "[i]f deemed necessary, a hearing to consider the proposed DSM/EE riders proposed by DEP will be held not less than 90 days after the filing date of the Company's [annual] application, supporting testimony, and exhibits."[2] That date, in this case, would have been October 30, 2019.

On August 21, 2019, the Clerk's office issued a notice requiring that intervenor comments be filed on or before October 15, 2019, and that petitions to intervene be filed by October 25, 2019. In order to accommodate the intevention deadline of October 25, 2019, the hearing examiner in this case issued Order No. 2019-100-H, which extended the intervenor comment period from October 15, 2019 to November 8, 2019. On November 8, 2019, Walmart Inc. ("Walmart") filed a letter in lieu of comments; the South Carolina State Conference of the NAACP, the Southern Alliance for Clean Energy, and the South Carolina Coastal Conservation League (collectively, "NAACP/SACE/CCL") filed comments; and ORS filed the ORS Report. On November 12, 2019, NAACP/SACE/CCL filed a letter indicating that it intended to amend its comments.

II. ORS Report

In its report filed in this proceeding, ORS proposed a reduction of $592.05 to South Carolina program costs due to insufficient supporting documentation ("Program Cost Audit Adjustment"), and a reduction of $20,688.56 to remove the portion of incentives related to

[1] Order No. 2015-596 at 13, Docket No. 2015-163-E (Aug. 19, 2015)

[2] *Id.* at 11.

Earnings per Share and Total Shareholder Return ("Incentive Adjustment"). ORS states that its proposed Incentive Adjustment is based on the following rationale: "1) payments for earnings goals is not certain; 2) earnings can be influenced greatly by factors such as customer growth and higher authorized returns which are not directly attributed to the actions of Company employees; and 3) incentive payments to employees should be made using increased earnings not through customer rates."[3]

The Company does not oppose the Program Cost Audit Adjustment of $592.05. However, the Incentive Adjustment is objectionable for a number of reasons and should be rejected by the Commission, as discussed below.

a. There is no evidentiary basis for a deviation from the compensation structure recently approved for DEP by the Commission.

ORS's argument for proposing the Incentive Adjustment in the ORS Report relies upon the same rationale articulated by ORS in the recent Dominion Energy South Carolina, Inc. ("Dominion") Rate Stabilization Act ("RSA") proceeding in Docket No. 2019-6-G,[4] which was adopted by the Commission in its order in that proceeding.[5] The Dominion RSA proceeding, however, is neither binding nor instructive in this proceeding because the Dominion RSA proceeding was a summary proceeding in which Dominion filed a report, ORS filed a review report, Dominion and ORS filed comments, and the Commission issued a decision. No party filed testimony, there was no hearing or evidentiary record, and the Commission had no opportunity to question witnesses or evaluate their credibility. In stark contrast to that summary proceeding, the

[3] ORS Report at 1.

[4] ORS Review of Dominion Energy South Carolina, Inc.'s Gas Rate Stabilization Act Monitoring Report at 4, Docket No. 2019-6-G (Aug. 30, 2019).

[5] Order No. 2019-729 at 3, Docket No. 2019-6-G (Oct. 15, 2019).

compensation structure of DEP and Duke Energy Carolinas, LLC (together, "Duke Energy") was fully litigated in the companies' recent rate cases. Duke Energy offered testimony—subject to cross-examination and Commissioner questions—on the specific issue of EPS and TSR incentives as a component of the Duke Energy subsidiaries' employee compensation structure. Ms. Metzler testified on behalf of the Companies that employee compensation tied to EPS and TSR benefit customers because those metrics reflect how employees' contributions translate into overall financial performance. ORS also presented testimony in the Duke Energy rate cases on this issue, including that of ORS witnesses Gaby Smith and Kelvin Major. After full evidentiary hearings, the Commission determined that Duke Energy's compensation structure was appropriate. In particular, the Commission found that Duke Energy's compensation structure, including EPS and TSR incentives, results in market-competitive compensation, and that, as long as the costs and results are reasonable, the Commission has no basis to disallow recovery.[6] These recent findings by the Commission, of which ORS did not seek rehearing, specifically approve of Duke Energy's compensation structure, which is the same as that which is implemented and recovered through the EE/DSM rider.

In light of the fully litigated rate case proceedings for the Duke Energy utilities, and the lack of testimony or other evidence in this proceeding, there is no evidentiary basis in this proceeding to support ORS's Incentive Adjustment. Instead, the evidence in the most recent relevant proceeding, the DEP rate case, supports the Company's proposed cost recovery in this proceeding and precludes acceptance of the Incentive Adjustment.[7] The cost recovery proposed

[6] Order No. 2019-341 at 85-87, Docket No. 2018-318-E (May 21, 2019); Order No. 2019-323 at 56-57, Docket No. 2018-319-E (May 21, 2019).

[7] *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 26–27 (1998) ("We conclude the circuit court erred in affirming PSC's decision on this issue because the record does not contain any testimony or other substantial evidence supporting PSC's conclusion. PSC decided the issue

in the EE/DSM Application filed in this case conforms to that which the Commission has approved for DEP. Order No. 2015-596, which approved the currently effective EE/DSM cost recovery mechanism for DEP, requires that the Company's EE/DSM riders "be calculated and charged to customers based on the revenue requirements associated with DSM and EE Programs."[8] Those revenue requirements necessarily include the administrative costs, referred to as "common costs" in Order No. 2015-596, that reflect the general compensation structure of DEP approved by the Commission. The Commission's specific findings of fact and conclusions of law in the recent Duke Energy rate cases are dispositive as to the compensation structure in the DEP EE/DSM proceeding, and precludes the acceptance of ORS's Incentive Adjustment.

b. ORS is collaterally estopped from relitigating Duke Energy's incentive compensation structure.

ORS is collaterally estopped from relitigating Duke Energy's incentive compensation structure, which was fully litigated and decided in its most recent rate cases. Collateral estoppel prevents a party from relitigating an issue in a subsequent suit that was actually and necessarily litigated and determined in a prior action, and the South Carolina appellate courts have applied the doctrine of issue preclusion to the determinations of administrative agencies.[9] As the S.C.

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arbitrarily, adhering to its past practice and simply announcing BellSouth is entitled to an allowance for cash working capital in its rate base without attempting to explain or support that decision."); *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (1992) ("The declaration of an existing practice may not be substituted for an evaluation of the evidence. A previously adopted policy may not furnish the sole basis for the Commission's action. The Commission must set forth findings which are sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings.").

[8] Order No. 2015-596 at 11, Docket No. 2015-163-E (Aug. 19, 2015).

[9] *See Crosby v. Prysmian Commc'ns Cables & Sys. USA, LLC*, 397 S.C. 101, 108, 723 S.E.2d 813, 817 (Ct. App. 2012); *Bennett v. S.C. Dep't of Corr.*, 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991); *Earle v. Aycock*, 276 S.C. 471, 475, 279 S.E.2d 614, 616 (1981)).

Supreme Court has articulated:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, courts have not hesitated to apply collateral estoppel to enforce repose. Under the doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.[10]

While the decisions of an administrative agency are not always preclusive in subsequent actions, the S.C. Supreme Court has provided the following test for making such a determination:

> In the abstract, there is no legitimate reason to permit a defendant who has already thoroughly and vigorously litigated an issue and lost the opportunity to relitigate the identical question. . . . The public interest demands an end to the litigation of the same issue. Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand *unless some compelling countervailing consideration necessitates relitigation*.[11]

In this case, pursuant to *Carman*, there is no question that the issue of Duke Energy's compensation structure was "actually litigated and determined by a valid and final judgment" in the rate cases, and that the determination as to the compensation structure was "essential to the judgment" in the Duke Energy rate case orders. This is so because, not only was incentive compensation addressed explicitly in the rate case orders, but also because the incentive compensation adjustment proposed by ORS in those cases was rejected by the Commission resulting in an ultimate rate that did not reflect that adjustment. The Commission's determination, again pursuant to *Carman*, is therefore conclusive in this subsequent action between the parties.

Further, pursuant to *Shelton*, this issue was "thoroughly and vigorously litigated" in the

[10] Carman v. South Carolina Alcoholic Beverage Control Comm'n, 317 S.C. 1, 6 (1994) (internal citations omitted) (holding that an agency's previous conclusions as to an applicant's moral character was binding in subsequent proceedings) (*Carman*).

[11] *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 254, 481 S.E.2d 706, 709 (1997) (emphasis added).

Duke Energy rate cases, and ORS has made no "compelling countervailing consideration necessitate[ing] relitigation" in this proceeding. The doctrine of collateral estoppel therefore acts to prevent ORS's relitigation of compensation structure in this proceeding.

c. The adjustment in the Dominion proceeding has no application to DEP.

The Dominion RSA proceeding is also distinguishable from and has no application to this DEP EE/DSM proceeding because the adjustment proposed by ORS in the Dominion RSA proceeding was derived from a settlement agreement between the parties to the underlying proceeding. Order No. 2005-619, which was the most recent Dominion RSA rate order,[12] approved a settlement agreement between Dominion/SCE&G, ORS and the other parties in which the incentive compensation at issue was excluded. According to ORS, that adjustment was "embedded in DESC's Monitoring Reports, final Commission approved revenue adjustments, and included in work papers but not explicitly identified in Commission orders."[13] With its Quarterly Monitoring Report filed on June 14, 2019 in Docket No. 2019-6-G, however, Dominion did not include the incentive compensation adjustment, relying instead upon the Commission's recent Duke Energy rate case orders. This resulted in ORS proposing the adjustment in the recent Dominion RSA proceeding and Dominion's subsequent opposition. According to ORS,

> Order No. 2005-619 included an adjustment to reduce employee incentive pay. In subsequent annual RSA filings, DESC proposed an adjustment to reduce employee incentive pay; however, in this annual RSA filing DESC did not include any adjustment to employee incentive pay. ORS's Adjustment #23 for incentive pay

[12] *See* ORS Review of Dominion Energy South Carolina, Inc.'s Gas Rate Stabilization Act Monitoring Report at 6, Docket No. 2019-6-G (Aug. 30, 2019) ("ORS reviewed the Company's proposed tariffs for conformance, as nearly as practicable, to the revenue allocation principles set out in the Company's most recent rate order, which is Commission Order No. 2005-619 in Docket No. 2005-113-G.")

[13] ORS Reply to Dominion Energy South Carolinas, Inc.'s Response at 2 n.5, Docket No. 2019-6-G (Sept. 26, 2019).

and executive's salaries and benefits totals ($566,955).[14]

DEP was not a party to the settlement agreement entered into in Docket No. 2005-113-G, and the associated incentive compensation adjustment has no application to DEP in this proceeding.

d. The costs at issue are eminently relevant to the provision of safe and reliable utility service.

As discussed above, (1) there is no evidentiary basis in this proceeding to deviate from the Company's approved compensation structure; (2) ORS is collaterally estopped from relitigating Duke Energy's incentive compensation structure, which was fully litigated and decided in its most recent rate cases; (3) the Dominion RSA proceeding is wholly inapplicable to the instant proceeding; and (4) the Commission's findings and approval of the Company's compensation structure in the recent rate cases is dispositive as to this issue in this proceeding. Nevertheless, the Company would also address this issue on the merits.

As testified to by Company witness Renee Metzler in the recent DEP rate case, Duke Energy's compensation structure benefits its retail customers. While we will not reproduce her extensive testimony on this issue here,[15] primarily because the issue has already been fully litigated and decided in favor of the Company, we would reiterate that Duke Energy's compensation structure provides a market-competitive total compensation package for its employees, which benefits the Company's retail customers. The skills needed for employees to render safe, reliable and high-quality utility service take several years to develop, and if the Company does not provide its talented employees competitive compensation consistent with the industry, then other utilities

[14] ORS Review of Dominion Energy South Carolina, Inc.'s Gas Rate Stabilization Act Monitoring Report at 4, Docket No. 2019-6-G (Aug. 30, 2019).

[15] *See* Rebuttal Testimony of Renee Metzler at 4-12, Docket No. 2018-318-E (filed Mar. 18, 2019); Hearing Transcript at 646-51, Docket No. 2018-318-E.

will hire its employees. The measures of Duke Energy's corporate incentive program are designed to drive results. To achieve strong incentive results, Duke Energy must operate reliably and safely, and it must deliver strong customer service and control its costs. Including a goal for financial performance in the incentive program ensures that employees pursue cost-effective ways to deliver these measures. In contrast, disallowing a portion of Duke Energy's compensation program would render the Company's compensation uncompetitive with the market, which would result in an inability to attract the talent the Company needs to run a safe and reliable electric system. The Company's compensation structure is reasonable and necessary to attract and retain high quality employees with the critical skills necessary to provide safe, efficient and reliable service to customers. For these reasons, as the Commission did in Duke Energy's recent rate cases, ORS's proposed Incentive Adjustment should be rejected.

III. Other Parties' Comments

Walmart does not oppose the Company's proposed rider in this proceeding, and reaffirms its willingness and desire to work cooperatively with Duke Energy and ORS. The Company intends to respond to the amended comments of NAACP/SACE/CCL once those have been filed with the Commission.

CONCLUSION

As discussed above, (1) there is no evidentiary basis in this proceeding to deviate from the Company's approved compensation structure; (2) ORS is collaterally estopped from relitigating Duke Energy's incentive compensation structure, which was fully litigated and decided in its most recent rate cases; (3) the Dominion RSA proceeding is wholly inapplicable to the instant proceeding; (4) the Commission's findings and approval of the Company's compensation structure in the recent rate cases is dispositive as to this issue in this proceeding; and (5) Duke Energy's

compensation structure is reasonable and necessary to attract and retain high quality employees with the skills necessary to provide safe, efficient and reliable service to customers. For these reasons, as the Commission did in Duke Energy's recent rate cases, ORS's proposed Incentive Adjustment should be rejected.

WHEREFORE, the Company requests that the Commission approve the Company's proposed Rider 11 to be effective January 1, 2020, subject to the Program Cost Audit Adjustment; reject ORS's Incentive Adjustment; and grant such other relief as the Commission deems just and proper.

Respectfully submitted this 15th day of November, 2019.

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